United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1391

To be argued by
FREDERICK T. DAVIS

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1391

UNITED STATES OF AMERICA,

Appellee,

—v.—

LIONEL MARQUEZ, a/k/a "Chile Marquez",

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

THOMAS J. CAHILL,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

FREDERICK T. DAVIS,
LAWRENCE B. PEDOWITZ,
Assistant United States Attorneys,
Of Counsel.

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1391

UNITED STATES OF AMERICA,

Appellee,

—v.—

LIONEL MARQUEZ, a/k/a "CHILE MARQUEZ",

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Lionel Marquez appeals from a judgment of conviction entered on November 23, 1975, in the United States District Court for the Southern District of New York, after a six-day trial before the Honorable Morris E. Lasker, United States District Judge, and a jury.

Indictment 75 Cr. 715, filed on July 18, 1975, charged James Richardson, Sergio Peralta Oyanedel, Hector Perez and Rafael Sarmiento in Count One with conspiring to distribute, and possess with intent to distribute, cocaine. Count Two charged Lionel Marquez, Richardson, Peralta and Sarmiento with distribution of and possession with intent to distribute, approximately one kilogram of cocaine on August 22, 1972. Count Three charged Marquez, Richardson and Perez with distribution of, and possession with intent to distribute, similar amount of cocaine in November, 1972.

On October 20, 1975, trial commenced against the defendants Marquez and Peralta.* On October 27, 1975 the jury returned a verdict of guilty as to both Marquez and Peralta on Count Two and a verdict of not guilty as to Marquez on Count Three.**

On November 25, 1975, Marquez was sentenced to fifteen years in prison, to be followed by six years of special parole.*** At the time of sentence, a motion for bail pending appeal for Marquez—who was placed in federal custody in lieu of increased cash bail shortly after conviction—was denied by the District Court. On December 23, 1975, this Court denied Marquez' motion for bail pending appeal. Marquez has filed motion papers in the Supreme Court of the United States seeking bail pending appeal.

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* Subsequent to the filing of the indictment, it was discovered that James Richardson had died on October 12, 1973. A nolle prosequi was filed as to him on September 4, 1975. Sarmiento and Perez were and remain fugitives.

** At the close of the Government's case, the court had granted a motion made by counsel for Peralta to dismiss Count One as to him.

*** An information charging Marquez with a prior narcotics conviction was filed by the Government on October 15, 1975 pursuant to 21 U.S.C. § 851, and this prior conviction was admitted by Marquez at the time of sentence (Sent. Tr. 22). The maximum sentence on Count Two was thus 30 years in prison to be followed by a minimum of six years special parole. 21 U.S.C. § 841(b)(1)(A).

On December 12, 1975, the co-defendant Peralta was sentenced to time served and ordered turned over to the Immigration and Naturalization Service for deportation. His counsel has filed an affidavit pursuant to *Anders* v. *California*, 386 U.S. 738 (1967), stating that there are no appealable issues in Peralta's case.

Statement of Facts

A. Prior Proceedings on Indictment 74 Cr. 1093.

Prior to the trial in the instant case, Marquez had been tried for unrelated narcotics charges for which he was ultimately acquitted. Charges were originally contained in Indictment 74 Cr. 576, filed on June 6, 1974. That indictment named Lionel Marquez, a woman named Lina Gotes, and sixteen others* and charged them in Count One with conspiracy to violate the federal narcotics laws between July 1, 1971 and the date of the filing of the indictment. Counts Two through Five charged Marquez and others with substantive violations of the narcotics laws, for which the acts were alleged to have occurred on various dates between May, 1973 and April 16, 1974. On November 4, 1974, Ms. Gotes pleaded guilty to three counts of Indictment 74 Cr. 576. On November 20, 1974, this indictment was superseded by Indictment 74 Cr. 1093 (App. 20a-27a),** which dropped one of the substantive counts and reflected minor changes in the overt acts alleged in the conspiracy count.

On December 2, 1974, trial began on Indictment 74 Cr. 1093 before Judge Marvin E. Frankel against Marquez and a co-defendant. During the course of a two-week trial, evidence was introduced concerning importation of cocaine into the United States by Marquez and others during 1973 and 1974 and showing substantive violations of the narcotics laws through the sale or possession of specific packages of imported cocaine on the approximate dates alleged in the indictment. In particular, Vladimir

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* Other than Marquez, none of the defendants named in Indictment 74 Cr. 576, or in the indictment which superseded it, 74 Cr. 1093, were included in the present indictment.

** Citations to "App." refer to the defendant's appendix filed on this appeal.

Banderas testified that he and others sent multi-kilogram packages of cocaine from Chile to the United States between May and September, 1973; that his contact in the New York area was Lina Gotes; and that Gotes' "buyer" was Lionel Marquez. In addition, agents and employees of the Drug Enforcement Administration testified that they acted as conduits between cocaine sellers in Chile and Lina Gotes, and in April, 1974, observed Ms. Gotes take delivery of a package of cocaine in the company of Lionel Marquez. On December 14, 1974, the jury returned a verdict of not guilty as to both defendants on all counts.

B. The Investigation Leading to the Present Case.*

In July, 1974, Lina Gotes was arrested on a bench warrant issued on Indictment 74 Cr. 576. During the following months, she spoke on several occasions with agents of the Drug Enforcement Administration about her knowledge of various narcotics activities; however, at all times during 1974 she adamantly refused to testify in any trials because of her fear of retribution. (App. 13a, 17a; Tr. 354). On November 27, 1974, following her plea of

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* The statement of facts concerning the investigation leading to the present indictment is drawn principally from three affidavits filed by the Government in opposition to Marquez' motion to dismiss the indictment because of undue and prejudicial delay in bringing the indictment. These affidavits, sworn to by Frederick T. Davis, the Assistant United States Attorney who prosecuted the present case; Bancroft Littlefield, Jr., the Assistant United States Attorney in charge of the prosecution under 74 Cr. 1093; and Saverio J. Weidl, a Special Agent of the Drug Enforcement Administration who testified at the earlier trial and was the principal investigative agent in the present case, were entirely unrebutted by any factual allegation by the defense. Wherever testimony at trial touched upon the facts of the investigation, citations to the trial transcript (Tr.) are included as well as reference to the affidavits, which are included in the appendix filed by Marquez.

guilty to certain counts of the indictment, Gotes mentioned for the first time to Special Agent Weidl that in 1972 she had engaged in a cocaine transaction with Marquez that was totally separate from those alleged in the then-pending indictment. She then related to Agent Weidl the events underlying Count Two of the instant indictment. Gotes also stated that one Sergio Castillo, in whose apartment she then lived, was present during the transaction. (App. 7a-8a, 13a, 17a; Tr. 524-529).

On November 29, 1974, Agent Weidl served a copy of a subpoena addressed to Castillo upon his wife, and on November 30, 1974—the Saturday immediately preceding the commencement of trial on Indictment 74 Cr. 1093 on Monday, December 2—Castillo appeared in the office of the United States Attorney and related, in part, his knowledge of the events underlying Count Two. Castillo met with members of the United States Attorney's office on several occasions during the December, 1974 trial of Indictment 74 Cr. 1093, but was not called as a witness. (App. 7a-8a, 13a-14a, 17a-18a).

On January 2, 1975—approximately two weeks after being sentenced to nine years in prison by Judge Frankel on her plea to indictment 74 Cr. 576—Lina Gotes spoke with Assistant United States Attorney Davis and for the first time agreed to testify in trials for the Government. (App. 8a). In March, 1975, she testified for the Government in the trial against one Elva Morales* and during

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* Elva Morales was originally named as a defendant along with Gotes and Marquez in Indictment 74 Cr. 576. On motion by the defendant, and with the consent of the Government, her case was severed from that of the other defendants, and she was named as the sole defendant in superseding Indictment 74 Cr. 1189. After trial before Judge Frankel and a jury, she was convicted on March 27, 1975. She was sentenced on May 28, 1975, to four years probation, and on September 4, 1975, this Court affirmed her conviction without opinion.

the spring she was extensively debriefed by Agent Weidl. During the same period, through June, 1975, Agent Weidl interviewed other potential witnesses and sought other evidence for this case. (App. 8a-9a, 14a-15a).

C. The Trial on the Present Indictment, 75 Cr. 715.

1. The Government's Case.

The Government called five witnesses at the instant trial. Three of these witnesses testified primarily about the events underlying Count Two of the indictment.

Sergio Castillo, who stated that he was a Chilean citizen living in Chile, testified that in the summer of 1972 he lived in apartment 4-D at 20 Sickles Street, in Manhattan. In addition to his wife, he also shared his apartment with Lina Gotes, who paid rent. On August 9, 1972, his only son was born at the Metropolitan Hospital, and approximately two weeks later the infant was brought home. Upon his return from the hospital with his wife and newborn son, he noticed that Ms. Gotes—who had recently been in the Prospect Hospital for an operation on her feet—was there with a number of other people, including Rafael Sarmiento and Sergio Peralta, whom he knew as "Cholo". Gotes made a number of telephone calls and at one time left the apartment. She told Castillo that some friends of hers would come that evening to do a "deal". (Tr. 5-11).

Between 9:00 and 10:00 that same evening, Lionel Marquez entered the apartment together with a man whose name Castillo did not know.* They went into a

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* Castillo, however, did recognize Government's Exhibit 2 as a photograph of this man. (Tr. 24). Lina Gotes subsequently identified the same exhibit as a photograph of James Richardson. (Tr. 194).

sitting room with Lina Gotes and had a conversation to which Castillo was not a party. Some time later, the doorbell rang and Castillo admitted Sergio Peralta. Immediately after entering, Peralta withdrew from his clothes a bag containing white powder and another bag containing white powder fell to the floor. Castillo took these bags and gave them to Lina Gotes. Peralta subsequently left. Somewhat later, Marquez and Richardson also left. Richardson carried a plastic bag that he had with him on entering which was bigger upon leaving than when entering. (Tr. 22-40).

Later that evening Gotes remarked to Castillo that she had sold "the merchandise" to Marquez for $13,000. Sarmiento arrived, and he, Gotes and Castillo then counted the money left by Marquez, which was found to be approximately $500 short. The next day Castillo accompanied Gotes when she went to tell Richardson that $500 was missing. (Tr. 40-42, 62-63).

Eliana Castillo, the wife of Sergio Castillo, also testified about her recollections of the evening of the day her baby came home from the hospital. She spent virtually the entire evening in a back room with the baby. At one point she heard a person or persons arrive at the door, and soon thereafter Lina Gotes brought Marquez into her room to see the baby. Later that evening she heard the voice of, but did not see, Sergio Peralta. (Tr. 144-54).

She also testified that on the day following the narcotics transaction she was alone at the apartment when Marquez appeared at the door and left with her a sum of money in cash. (Tr. 155-56).

Lina Gotes testified that in early 1972 she had been released from prison after serving part of a five year sentence for dealing in cocaine, and during the summer of 1972 she rented a room with the Castillo family. Also

that summer she was approached by Rafael Sarmiento who accused her of cooperating with federal narcotics agents, and was shown part of a letter Sarmiento had received from Chile stating that she had done so. (Tr. 181-84).

In August, 1972, she entered the Prospect Hospital for an operation on her feet. During her stay she was visited by Sarmiento and Peralta. Sarmiento told her that she could prove her *bona fides* by finding a buyer for a kilogram of cocaine that he had. Gotes agreed, and she was physically removed from the hospital by Sarmiento and Peralta without checking out.* She initially went to her room in the Castillo apartment to find a telephone number, but could not find the number. Gotes then drove with Sarmiento and Peralta to a restaurant owned by Lionel Marquez. There, she had a conversation with Marquez in which he agreed to buy the kilogram of cocaine and stated that he would come to the apartment that night. Gotes then returned to the apartment. (Tr. 185-93).

Gotes' account of the subsequent events coincided in large part with that given by Castillo. (Tr. 193-203).

Gotes also testified that in November, 1972, she was approached by a man named Hector Perez, who told her that he had a kilogram of cocaine to sell. Gotes again contacted Marquez, and Marquez came with Richardson to her new apartment on Ogden Avenue in the Bronx and bought the cocaine, which had been delivered shortly before by Perez. (Tr. 205-09). These events were the basis for Count Three.

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* Ms. Gotes did not remember the precise date she left the hospital. However, the defense and the Government stipulated to the admission into evidence of Government's Exhibit 5, which was a hospital record showing that Gotes left the hospital on August 22, 1972. (Tr. 324).

The Government also called two witnesses concerning an attempt made by Marquez to induce Lina Gotes not to testify.* Claudio Gajardo testified that he was the fiance of Lina Gotes, and that on September 2, 1975, he had been contacted by a woman he knew as Amy who asked him to meet with Marquez. Gajardo agreed to do so, and immediately informed Lina Gotes. That evening he met with Marquez, Amy and another woman at the Old Coin Restaurant in Manhattan. Marquez stated, among other things, that he would pay Gotes a stipend of $200 per week if she agreed not to testify against him and further that he would help her escape from prison. Marquez also requested Gajardo to make a tape recording with Amy that would implicate Lina Gotes in an attempt to testify falsely against him. Marquez also asked Gajardo if he knew where Sergio Castillo and Rafael Sarmiento were and how Marquez could "stop" them. At the end of the meeting which lasted several hours, Marquez offered Gajardo a sniff of cocaine. (Tr. 369-84).

Robert Nieves, a Special Agent of the Drug Enforcement Administration, stated that on September 2, 1975, he received a telephone call from Lina Gotes. As a result of that call, he and brother agents immediately went to the Bronx and followed Claudio Gajardo to the Old Coin Restaurant. Nieves entered the restaurant, had a drink, and observed Gajardo talking with Marquez and two women. (Tr. 444-56).

2. The Defense Case

Sergio Peralta called one witness in his behalf and also testified himself.

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* This was introduced as tending to show Marquez' consciousness of guilt.

Peralta stated that he knew Rafael Sarmiento; that he occasionally did errands for him; and that on several occasions he visited Sergio Castillo at his apartment and met Lina Gotes there. He denied ever carrying any cocaine into the apartment and stated that he had never met or seen Lionel Marquez. (Tr. 545-65).

Carmen Castro, Peralta's common-law wife, testified that in June, 1975, she was at a picnic and saw Lionel Marquez standing next to her husband, and that neither of them appeared to recognize each other. (Tr. 566-75).

Lionel Marquez called five witnesses in his behalf. Bancroft Littlefield, Jr., stated that he was an Assistant United States Attorney and that he was in charge of the prosecution of Lina Gotes. He further stated that during 1974 he had a number of conversations with Ms. Gotes and that she cooperated to a limited extent with the Government during 1974. During December, 1974, Littlefield also spoke with Sergio Castillo. (Tr. 504-09).

Saverio J. Weidl stated that he was the Drug Enforcement Administration agent principally in charge of the present case, and detailed part of the events of which the investigation was comprised, including his initial meetings with Sergio Castillo. He also stated that he had asked Lionel Marquez to cooperate with the Federal Government, and that Marquez had refused.

On cross-examination by the Government, Weidl related in detail a statement made to him by Lina Gotes on November 27, 1974, when she first told him of the events occurring in August, 1972. He also stated that when he asked Marquez to cooperate, Marquez asked what the charges were against him before stating that he would not cooperate. (Tr. 509-31).

Sandy Brown testified that he was an old friend of Marquez and that on a number of occasions he saw James

Richardson in Marquez' presence while Richardson was attempting to unionize the restaurant workers in Marquez' employ. (Tr. 532-38).

Naim Garcia, who on cross-examination identified himself as a nephew of Lionel Marquez, stated that in late 1974 Claudio Gajardo came to his mother's apartment and left a letter for his mother. When asked whether Gajardo had spoken in loud or abusive tones, Garcia stated that he could not remember. (Tr. 539).

The final witness was Amy Vega. She stated that she was present at the meeting among herself, Marquez, Gajardo and a fourth woman (whom she identified as Marquez' wife, Eliza Rosario) on September 2, 1975. Her version of the event was that Lina Gotes had earlier told her that she was pregnant, and that during the September, 1975, meeting Gajardo continually asked Marquez for $10,000 on behalf of Lina Gotes. (Tr. 590-612).

ARGUMENT

POINT I

Marquez' previous acquittal under an indictment charging entirely separate crimes and based on different facts did not bar the conviction in this case.

Marquez was accused in Indictment 74 Cr. 1093 of conspiring with Lina Gotes and many others to import cocaine into the United States and to distribute it in New York City, and with actual distribution or possession of three separate packages on dates between May, 1973, and April, 1974; he was acquitted on those charges. His argument that this acquittal somehow barred the Government from trying him on an entirely separate charge

concerning a totally different transaction occurring in 1972 is utterly without merit.*

As Marquez appears to recognize (Br. at 11), the Fifth Amendment prohibition against being put twice in jeopardy does not apply to Marquez since the facts alleged and proved in the first case are entirely separate from those alleged and proved in this case. Indeed, no Government witness in this case testified in the 1974 trial; not one of the events that were charged and proved in this case was even mentioned in the prior trial; nor were any of the defendants in this case other than Marquez even mentioned in the entire transcript of the 1974 trial. It is thus crystal clear that Marquez has utterly failed to show that "the offenses charged were in law and fact the same," *United States* v. *Cala*, 521 F.2d 605, 607 (2d Cir. 1975), quoting from *United States* v. *McCall*, 489 F.2d 359, 362 (2d Cir. 1973), *cert. denied*, 419 U.S. 849 (1974), or that "the evidence required to support a conviction upon one [indictment] would have been sufficient to warrant a conviction upon the other," *United States* v. *Cioffi*, 487 F.2d 492, 496 (2d Cir. 1973), *cert. denied*, 416 U.S. 995 (1974). See also *United States* v. *Bommarito*, 524 F.2d 140, 146 (2d Cir. 1975).**

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* This claim was rejected prior to trial by Judge Lasker in a written memorandum dated October 8, 1975 (App. 19a), in which he stated, *inter alia*, "[f]rom the face of each indictment it appears that the crimes and facts alleged in the earlier indictment are separate and distinct from the crimes and facts presently alleged."

** *Short* v. *United States*, 91 F.2d 614, 619 (4th Cir. 1937), upon which Marquez relies (Br. at 14), concerned the issue of whether two separately charged *conspiracies* were in fact the same agreement, an issue on which this Court focused in *United States* v. *Mallah*, 503 F.2d 971, 982-87 (2d Cir. 1974), *cert. denied*, 420 U.S. 995 (1975). Marquez was not named as a defendant in the conspiracy count of this indictment and the case is thus irrelevant to a determination of whether Marquez' conviction on a *substantive* charge was barred by prior proceedings.

Nor does Marquez' reliance upon the doctrine of collateral estoppel, as made applicable to criminal prosecutions in *Ashe* v. *Swenson*, 397 U.S. 436 (1970), have any merit. *Ashe* held that the principle of collateral estoppel —that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties," *id.* at 443—is embodied in the Fifth Amendment guarantee against double jeopardy. *Id.* at 445. Subsequent decisions in this circuit have made clear, however, that to establish the preclusive effect of a prior decision on a factual issue the defendant has the burden, *United States* v. *Cala*, *supra*, 521 F.2d at 608; *United States* v. *Gugliaro*, 501 F.2d 68, 70 (2d Cir. 1974); *United States* v. *Tramunti*, 500 F.2d 1334, 1346 (2d Cir.), *cert. denied*, 419 U.S. 1079 (1974), of demonstrating "with certainty", *United States* v. *Cioffi*, *supra*, 487 F.2d at 498, that the prior verdict "necessarily" determined a fact at issue in the second trial. *United States* v. *Gugliaro*, *supra*, 501 F.2d at 70; *United States* v. *Tramunti*, *supra*, 500 F.2d at 1346; *United States* v. *Zane*, 495 F.2d 683, 691 (2d Cir.), *cert. denied*, 419 U.S. 895 (1974).

The jury that acquitted Marquez of the charges in Indictment 74 Cr. 1093 necessarily found only that the Government had failed to prove beyond a reasonable doubt that Marquez conspired with Gotes and others to import and distribute cocaine or that he participated in the actual distribution of several specific packages of cocaine between May, 1973, and April, 1974. Since the instant trial involved only proof of transactions that took place in 1972,* this is hardly an instance of the "rare

* Marquez' statement that "[t]he prior jury said appelland [sic] did not have narcotic dealings with Lina Gotes during the same period of time which forms the basis of the second trial" (Br. at 18), is sheer hyperbole. The transcript of the prior trial is barren of any evidence of any transactions of Marquez during 1972, nor were any alleged in that indictment.

situation in which the collateral estoppel defense will be available to the defendant." *United States* v. *Tramunti*, *supra*, 500 F.2d at 1346.

POINT II

The Court did not err in excluding from evidence the fact of Marquez' acquittal on Indictment 74 Cr. 1093.

Prior to the commencement of the trial in this case, Judge Lasker ruled that the fact of Marquez' acquittal on Indictment 74 Cr. 1093 could not itself be put into evidence unless its specific relevance was demonstrated during the course of testimony. (Tr. 56). During trial, however, the Court allowed counsel for Marquez to question Government witnesses concerning their knowledge of the events of that case and of the trial itself, including their subjective reaction to the result of the trial. (Tr. 282). Marquez argues that he should have been allowed to present to the jury the fact of the acquittal. This claim is meritless.

First, Marquez has not shown any issue considered by the jury as to which the fact of the acquittal was relevant. Indeed, the vast majority of the issues that Marquez now says he wished to raise (Br. at 19) are not issues to be decided by a jury. The principal basis that Marquez now claims warranted admission of the fact of his prior acquittal is his assertion that the prosecution was tainted by selective prosecution and harassment. Every court that has considered the matter, however, has ruled that such a "defense" is not properly addressed to the jury.*

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* Significantly, Marquez does not contend that the denial by the District Court of his motion to dismiss the indictment because of selective prosecution was legal error.

United States v. *Berrigan*, 482 F.2d 171, 174-76 (3rd Cir. 1973); *United States* v. *Malinowski*, 472 F.2d 850, 860 (3rd Cir.), *cert. denied*, 411 U.S. 970 (1973); *People* v. *Utica Daw's Drug Co.*, 16 A.D. 2d 12, 225 N.Y.S. 2d 128 (4th Dep't. 1962); *People* v. *Walker*, 14 N.Y. 2d 901, 252 N.Y.S. 2d 96, 99 (1964). These decisions are wholly consistent with numerous decisions of the Supreme Court holding that issues other than the guilt or innocence of the defendant are not to be decided by the jury. *Ford* v. *United States*, 273 U.S. 593, 606 (1927); *Dennis* v. *United States*, 341 U.S. 494, 512-13 (1951). See generally, Wright, *Federal Practice & Procedure* § 194, at 414 (1969).

Marquez' claim that the fact of the acquittal was relevant to a determination of the issues of collateral estoppel and double jeopardy is equally meritless.* While few courts have been faced with the issue of whether a claim of double jeopardy or collateral estoppel is one for the jury, compare *United States* v. *H. E. Koontz Creamery, Inc.*, 257 F. Supp. 295, 299 (D.C. Md. 1966),** with *Short* v. *United States*, 91 F.2d 614, 619 (4th Cir. 1937), the only logical conclusion is that it is not. Since the essence of the right is not to be twice put in jeopardy, "a final determination of whether jeopardy has attached to the previous trial must, where possible, be determined prior to any retrial." *United States* v. *Beckerman*, 516

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* In addition, Marquez never indicated at trial that he wished the jury to decide his claim of collateral estoppel; rather his entire argument concerning the admissibility of the acquittal rested on his assertion of improper motive on the part of the Government. His claim that the jury should have been allowed to know of the acquittal in order to determine the collateral estoppel issue was thus not preserved for appeal. *United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965) (en banc), *cert. denied*, 383 U.S. 907 (1966).

** The *Koontz* decision was called a "learned opinion" in Wright, Federal Practice & Procedure *supra* at § 194, at 414.

F.2d 905, 906 (2d Cir. 1975); see also *Green* v. *United States*, 355 U.S. 184, 197 (1957). Such a determination by its nature requires that the issue be resolved by the judge rather than a jury.

Second, Marquez' argument that the jury below was invited to speculate about the "seriousness and outcome" of the prior trial (Br. at 27) entirely misstates the record. A reading of the transcript makes it abundantly clear not only that no mention of the 1974 case was made in the Government's case, but also that elicitation of it by the defense on cross-examination was entirely gratuitous. (Tr. 242-43). Indeed, on numerous occasions when Marquez attempted to extract from a witness the facts of the 1974 trial, an objection was sustained by the Court. (Tr. 243-44). Any harm stemming from Marquez' inability to let the jury know the entire story was the result of his stubborn insistence on their knowing part of it, even in the face of the District Court's rulings that the issue should be avoided. Having created the situation, Marquez can hardly complain of it on appeal.*

Finally, it is clear from the transcript of the trial that Marquez was allowed complete latitude to engage in proper cross-examination of the witnesses against him. Not only did he question them about their prior criminal activities and promises made to them by the Government, but Marquez was also allowed to question whether anyone connected with the Government had importuned them

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* The record further indicates that it is highly unlikely that the jury was unaware of Marquez' acquittal. Not only did Lina Gotes answer, "Yes, of course. I don't want anybody to be in jail," when asked if she was happy with the result of Marquez' 1974 trial (Tr. 282), but Marquez' final witness blurted out in response to a question of Marquez' attorney that Marquez had been acquitted. (Tr. 596).

to testify against Marquez. (Tr. 56, 225, 282, 285).* In addition, Marquez was allowed to ask witnesses whether they were aware of the result of the trial against Marquez, and what their reaction to that result was. (Tr. 282). In that context, it was clearly within the discretion of the District Court to rule that the probative value of the fact of Marquez' acquittal was completely outweighed by its distracting impact.** *United States* v. *Green*, 523 F.2d 229, 237 (2d Cir.), *cert. denied*, — U.S. —(44 U.S.L.W. 3358, Dec. 16, 1975); *United States* v. *Kahn*, 472 F.2d 272, 279, 281 (2d Cir.), *cert. denied*, 411 U.S. 982 (1973); *United States* v. *Mahler*, 363 F.2d 673, 676-78 (2d Cir. 1966). *United States* v. *Pacelli*, 521 F.2d 135, 137 (2d Cir. 1975), *cert. applied for Nov. 21, 1975*, 44 U.S.L.W. 3331 (Dec. 2, 1975).

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* Indeed, since no agents connected with the 1974 case testified for the Government in this trial, any showing of *their* motive would be irrelevant. If Marquez were to draw any logical connection between the fact of the acquittal and the testimony at his trial, he would have to show that the agents connected with the 1974 case importuned the witnesses in the instant case to testify less than candidly.

** This was particularly clear when Marquez' counsel indicated that he wished to show, along with the fact of the acquittal, his view that the Government agents lied in the prior case and that the Government deliberately withheld evidence from the 1974 trial when it realized that it had a weak case. (Indeed, Marquez indicates in his brief his continued belief in the relevance of those facts, see (Br. at 25-26). As the District Court noted, opening the door to inquiry into the facts and the strength of the 1974 case risked doubling the length of the trial with testimony of no relevance to the issue before the jury. (Tr. 224). Prohibiting this unnecessary excursion was well within the District Court's discretion and its power to exclude evidence that would waste time, cause confusion or mislead the jury. See Fed. R. of Evid. 403; *Hamling* v. *United States*, 418 U.S. 87, 125, 127 (1974).

POINT III

There was no deliberate or undue delay in indictment Marquez, nor was Marquez prejudiced thereby.

Marquez' further argues that there was undue and deliberate delay in presenting this case to the grand jury. This claim is entirely baseless.*

Initially, it should be noted that while much of Marquez' brief contains references to decisions concerning a defendant's right to a speedy trial under the Sixth Amendment, it is clear—as Marquez appears to concede in the first paragraph of his argument on this point—that the Sixth Amendment is utterly inapplicable to this case. (Br. 28). In *United States* v. *Marion*, 404 U.S 307 (1971)—the seminal decision on the question of pre-indictment delay—the Supreme Court held that "it is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment."** *Id.* at 320. Rather, the Court found that the limits on pre-indictment delay are those imposed by the basic requirement of due process contained in the Fifth Amendment, and noted that due process would be offended "if it were shown at trial that the pre-indictment delay in this case caused substantial prejudice to [the defendant's] rights to a fair trial *and* that the delay was an intentional

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* Judge Lasker noted in a written memorandum filed prior to trial, App. 19a, that there had been no undue or deliberate delay, and that Marquez had shown no actual prejudice stemming from the date of the filing of the indictment.

** The trial in this case commenced less than three months after Marquez' arrest.

device to gain tactical advantage over the accused." *Id.* at 324 (emphasis added). Marquez has shown neither of these prerequisites.*

A. There was no deliberate or undue delay in procuring the indictment in this case.

Prior to trial in this matter, the Government filed affidavits of the Assistant United States Attorneys in charge of both the 1974 and 1975 prosecutions of Marquez, and also of the Drug Enforcement Administration agent principally in charge of the investigation of the 1975 case. In addition to containing the statement under oath of the Assistant in charge of the present case that the prosecution was never deliberately delayed, these affidavits—and subsequent testimony at trial—clearly showed the following:

> (1) No one in the Government knew anything concerning the facts underlying this case until November 27, 1974, when Lina Gotes related

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* The *Marion* court stated that in order to prevail on the issue of pre-indictment delay a defendant must show intentional delay *and* actual prejudice. While this Court has on occasion indicated that at least a demonstration of prejudice is necessary to sustain this defense, see *United States* v. *Iannelli*, 461 F.2d 483, 485 (2d Cir.), *cert. denied*, 409 U.S. 980 (1972); *United States* v. *Mallah*, 503 F.2d 971, 989 (2d Cir. 1974), *cert. denied*, 420 U.S. 995 (1975), the Court has recently stated that it has not resolved the issue of whether the *Marion* requirements are in the disjunctive or in the conjunctive. *United States* v. *Finkelstein*, — F.2d —, —, Dkt. No. 75-1154, slip op. 841, 854 (Dec. 1, 1975). While the Government maintains that both logic and the language of the *Marion* opinion clearly require a reading of the operative language in the conjunctive, the Court need not resolve that issue in this case since Marquez has shown neither deliberate delay nor actual prejudice.

to Agent Weidl some of the facts underlying Count Two of the Indictment;*

(2) On November 30, 1974, members of the Government spoke for the first time with Sergio Castillo, who at that time related *some* of his knowledge of the events underlying Count One of the Indictment;**

(3) On January 2, 1975—three weeks after the completion of the 1974 trial against Marquez —Ms. Gotes for the first time indicated that she would be willing to testify at a trial against Marquez;

(4) During the period between January, 1975, and the date of the filing of the indictment, July 18, 197 further potential witnesses were interviewed and evidence was gathered.***

Thus, it is overwhelmingly clear that any delay in this trial was neither "undue" nor "deliberate", as re-

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* At trial it became clear that Ms. Gotes did not tell Agent Weidl until some time later about the events of November, 1972, which constituted Count Three of the indictment. (Tr. 744).

** Indeed, as defense counsel pointed out at trial, Castillo's statements at the time of his initial interviews were incomplete and, in some particulars, mistaken. (Tr. 86-100).

*** Marquez notes in his brief that one of the potential witnesses whom the Government interviewed in June 1975, was one Lilliana Rodriguez, and further notes that Ms. Rodriguez did not testify at trial. He then observes that the Government has offered no explanation for her failure to be called as a witness. (Br. at 31). This is absolutely untrue. At the time of sentence, the Assistant United States Attorney noted that while Ms. Rodriguez had been prepared as a witness and had appeared at the courthouse at the time of trial, she indicated during the trial that she had been approached by a relative of Marquez' co-defendant and asked not to testify, and thereafter could not "remember" the events about which she was to be called to testify. (Sent. Tr. 3-4; Tr. 366).

quired by *Marion*. Not only did the Government have no motive to delay the bringing of the indictment,* but further the time between the initial discovery of the first leads to the development of the full case was fully needed in order to prepare a proper case. Nothing in *Marion* or its progeny suggests that the Government should go to the grand jury or to trial on an incompletely investigated case, see *United States* v. *Finkelstein*, *supra*, slip op. at 856; *United States* v. *Briggs*, 457 F.2d 908, 911 (2d Cir.), *cert. denied*, 409 U.S. 986 (1972); *United States* v. *Stein*, 456 F.2d 844, 848 (2d Cir.), *cert. denied*, 408 U.S. 922 (1972); see also *United States* v. *DeMasi*, 445 F.2d 251, 255 (2d Cir.), *cert. denied*, 404 U.S. 882 (1971); *United States* v. *Capaldo*, 402 F.2d 821, 823 (2d Cir. 1968), *cert. denied*, 394 U.S. 989 (1969). Nor does the decision of potential Government witnesses not to divulge their information at an earlier date constitute "delay." Indeed, in *United States* v. *Ferrara*, 458 F.2d 868 (2d Cir.), *cert. denied*, 408 U.S. 931 (1972), a case in which the period of time between the criminal events and the indictment was almost four years, the Court noted that the indictment was procured only two years after a principal witness agreed to co-operate, and held that the time period did not violate the *Marion* test. *Id.* at 875.

Finally, Marquez' implied assertion that the Government either deliberately failed to join the counts in the 1975 indictment with those of the 1974 indictment, or should have so joined them, is untenable both on its factual premise and the law. First, it is clear that as of the time of the 1974 trial the Government had only the beginnings of the present case against Marquez. While

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* Indeed, as the Government pointed out in a pre-trial affidavit, Marquez' period of parole from a prior narcotics conviction expired on August 20, 1975. Had he been brought to trial and convicted prior to that date, he would automatically have been adjudicated a parole violator. The "delay" of trial thus served as a benefit to Marquez and was clearly against the interest of the Government. (App. 10a).

Lina Gotes had recently related the events underlying one of the two counts, she adamantly refused to testify. Sergio Castillo had been discovered only on the Saturday immediately prior to the Monday on which the 1974 trial began, and even then only partially divulged his knowledge of the events. To claim that the Government should, on the eve of a multi-defendant trial, halt all court proceedings and risk a claim of proving a multiple rather than a single conspiracy by adding additional counts based on incomplete investigation is preposterous.

Indeed, Marquez' argument in this regard was rejected *a fortiori* by this Court in *United States* v. *Mallah*, 503 F.2d 971 (2d Cir. 1974), *cert. denied*, 420 U.S. 995 (1975). There, the defendant Pacelli was convicted of two substantive offenses that had occurred in 1971. The Government conceded that it had had all its information concerning those offenses for some time, and indeed that at least two other indictments of Pacelli had been voted by the grand jury between the time of the government's complete knowledge of the facts surrounding those offenses and the voting of the indictment. Noting that "the Government has not explained why it chose not to charge Pacelli with these two counts in the earlier trials," the Court continued:

> "We do not believe that where there has been no showing of prejudice this exercise of prosecutorial discretion is the type of action which the *Marion* court had in mind when it suggested that preindictment delay might invalidate a conviction if that delay were designed 'to harass' a defendant. 404 U.S. at 325. [Further citation on Hd]. Pacelli has not been charged with several offenses based on the same acts, and the charges which have been brought appear to have been well founded. Neither has appellant demonstrated that the delay is attributable to any motive other than that which

> is the *raison d'etre* of the prosecutor: to punish criminal behavior. [Citations omitted.] In short, the multiplicity of indictments is more attributable to the multiplicity of appellant's criminal acts than to the bad faith of the government." *Id.* at 989.

Where, as here, the Government shows that it acted with all due speed and at no time held back its knowledge of certain facts for a future trial, the absence of any "deliberate" delay is even more apparent than in *Mallah.*

B. No delay traceable to the Government caused any prejudice to Marquez.

Marquez makes four claims concerning "specific items of prejudice." (Br. 32). Each of these is spurious.

First, Marquez claims that hospital records showing the date of the release of the Castillo baby from the hospital could not be found. Even if the Government were to be held accountable for the entire period after November 27, 1974, when it first heard of Marquez' activities, there was no showing that the records were disposed of after that time or even that they had ever been kept. Furthermore, the records might at most have shown that the Castillo couple were incorrect about the date that their son was released. As this Court said with respect to a similar claim of prejudice in *United States* v. *Mallah, supra.* "This claim is too speculative and the evidence against appellant too weighty for us to conclude that the delay deprived appellant of a fair trial." 503 F.2d at 989.

Second, Marquez claims that two letters written by Lina Gotes were lost. Not only does this claim fail to show when the letters were lost, and thus whether the loss was even conceivably traceable to the Government, but Marquez makes no showing as to what the letters contained. In addition, Marquez himself stated at the time of his sentence that an associate, as well as him-

self, read the letters (Sent. Tr. 19), and thus if the letters had contained anything of impeachment value or of an exculpatory nature, he had a witness able to testify to their content.

Third, Marquez claims that "Jimmy" Richardson was dead. While the value of the presence of an indicted co-defendant is plainly "speculative", it is clear at any rate that Richardson died more than a year prior to the Government's first knowledge of the case.

Finally, Marquez claims that the original of a letter written to his lawyer by Lina Gotes was discarded after the first trial. In addition to a failure to specify when the letter was lost, this claim fails to acknowledge that Ms. Gotes fully admitted both the writing and the content of the letter (Tr. 233-38). Moreover, a partially legible copy was introduced in evidence at the trial. (Tr. 238).

In short, Marquez has failed to show any prejudice flowing even from the most generous calculation of the time when the Government might have brought this case to trial. Both the Supreme Court in *Marion, supra*, 404 U.S. at 322-23, and this Court, see *United States* v. *Brasco*, 516 F.2d 816, 818 (2d Cir.), *cert. denied*, — U.S. — (44 U.S.L.W. 3204, October 6, 1975); *United States* v. *Foddrell*, 523 F.2d 86, 87-88 (2d Cir. 1975); *United States* v. *Brown*, 511 F.2d 920, 922-923 (2d Cir. 1975), *cert. denied*, — U.S. — (44 U.S.L.W. 3397, Jan. 13, 1976), have emphasized that a showing of actual prejudice to the right to a fair trial, rather than presumed or imagined prejudice, is necessary to sustain the defense. Marquez' assertions concerning what "might" have occurred were the indictment to have been voted earlier simply fail to meet the test, and the claim is utterly without merit.

POINT IV

The jury should not have been told that Lina Gotes was testifying under a grant of immunity, since she was not.

Marquez' final point is that the jury should have been informed that Lina Gotes testified before the grand jury and at trial under a grant of immunity.

Lina Gotes did not testify under a grant of immunity, nor was she ever conferred immunity with respect to this case. While she entered into a written agreement with the Government that her statements and testimony would not be used against her, that agreement was offered by the Government and admitted into evidence. (Tr. 363).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

THOMAS J. CAHILL,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

FREDERICK T. DAVIS,
LAWRENCE B. PEDOWITZ,
Assistant United States Attorneys, Of Counsel.

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Frederick T. Davis being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 20 day of Feb, , 1976, he served a copy of the within brief by placing the same in a properly postpaid franked envelope addressed:

Joseph J Stone
277 Broadway
New York NY 10007

And deponent further says that he sealed the said envelope and placed the same in the mail box for mailing at One St. Andrew's Plaza, Borough of Manhattan, City of New York.

Frederick T. Davis

Sworn to before me this
20 day of February, 1976

Jeanette Ann Grayeb

JEANETTE ANN GRAYEB
Notary Public, State of New York
No. 24-1541.75
Qualified in Kings County
Commission Expires March 30, 1977